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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MUNTU MITCHELL, Plaintiff and Appellant, v. LAKE ELSINORE UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	E035836 (Super.Ct.No. RIC 407844) OPINION

APPEAL from the Superior Court of Riverside County. Dallas Holmes, Judge. Affirmed.

Law Offices of Isaac Nalive, Isaac Nalive and Rita Nalio for Plaintiff and Appellant.

Pollak, Vida & Fisher, Girard Fisher and Daniel P. Barer for Defendant and Respondent.

1. Introduction

Muntu Mitchell (petitioner) appeals from the trial court's decision denying his petition under Government Code section 946.6 for an order permitting a late claim against the Lake Elsinore Unified School District (District) on the ground of excusable neglect.[1] On appeal, petitioner claims the trial court abused its discretion in denying his petition because District was estopped from asserting late compliance and because petitioner satisfied the requirements of section 946.6, including the showing of excusable neglect.

We conclude that the record fails to support petitioner's claims of estoppel and excusable neglect. We affirm the court's order denying the petition.

2. Factual and Procedural History

On March 25, 2003, Jeanne Chavez, who was driving defendant's school bus, allegedly rear-ended petitioner's car. After the accident, petitioner retained an attorney, who represented him until June 30, 2003. After that time, petitioner represented himself in propria persona until he was able to retain his current attorney, Rita Nalio, from the Law Office of Isaac Nalive.[2]

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[1] All further statutory references will be to the Government Code unless otherwise stated.

[2] In his opening brief, plaintiff states that he initially was represented by Patrick Conkey until June 30, 2003, and then by Edward Topolski until July 24, 2003. Plaintiff also states that he hired his current attorney on or about August of 2003. Nothing in the record confirms this information. For purposes of this opinion, we will assume that plaintiff was represented by one attorney until June 30, 2003, as indicated in his petition.

On June 9, 2003, Valarie Dawson, the property and liability lead claims examiner for the Self-Insured Schools of California (SISC), sent petitioner a letter concerning the claims requirement. In the letter, Dawson wrote: "Please be advised that if you intend to pursue a bodily injury claim against Lake Elsinore Unified School District, you must do so within six (6) months from the date of the occurrence in accordance with the provision of Government Code 910, et[.] seq. I am enclosing a claim form for your use in presenting a claim if you so desire."

On October 30, 2003, after the six-month period had elapsed, petitioner's current attorney, Rita Nalio, filed an application for permission to present a late claim. Nalio explained that she assumed that a government claim was not required because it was not apparent from the insurer's name, "Self-Insured Schools of California," that petitioner's case involved a public entity. She also explained that none of the letters in petitioner's case file indicated that a claim was required. Defendant apparently denied the claim on or about December 17, 2003.

On February 19, 2004, petitioner filed in superior court a petition for an order permitting a late claim under section 946.6. In support of his petition, petitioner submitted only a copy of his application to District to file a late claim. Petitioner did not file any points and authorities or submit any supporting evidence. In opposing the petition, District argued that petitioner had failed to satisfy the requirements for relief under section 946.6. At the hearing on April 6, 2004, the court denied the petition. The court found that there was no evidence that petitioner's application was filed within a reasonable time or that his current attorney acted reasonably in prosecuting his case.

3. Discussion

Petitioner claims the trial court abused its discretion in denying his petition for relief under section 946.6. Petitioner specifically raises the following three arguments: District was estopped from asserting that petitioner's claim was untimely because the notice of the claims requirement also was untimely; petitioner submitted his application to file a late claim within a reasonable time; and the late claim was the result of counsel's excusable neglect.

Section 945.4 of the Government Tort Claims Act requires that a plaintiff present a written claim directly to the public entity before filing a lawsuit against that public entity for money or damages. (See also *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 767; *Ard v. County of Contra Costa* (2001) 93 Cal.App.4th 339, 343.) A claim relating to a cause of action for personal injury must be filed with the public entity within six months after the accrual of the cause of action. (§ 911.2; see also *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 708.) If the plaintiff fails to file a timely claim, the plaintiff may apply to the public entity to file a late claim and, if unsuccessful, may petition the superior court for relief from the claims requirement. (§§ 911.4, subd. (a), & 946.6; see also *Ard v. County of Contra Costa, supra*, 93 Cal.App.4th at p. 343.)

Section 946.6 sets forth the procedure and the criteria for obtaining relief from the superior court. The court may grant the petition if the court finds that the plaintiff submitted his application to the public entity to file a late claim within a reasonable time and that other circumstances justify the late filing, including that the plaintiff failed to

present the claim because of mistake, inadvertence, surprise, or excusable neglect, and the public entity cannot demonstrate any prejudice. (§ 946.6, subd. (c)(1); see *Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 275.) The plaintiff bears the burden of establishing the elements required to obtain relief. (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1783.)

The trial court's order is reviewed for an abuse of discretion. (*Bettencourt, supra*, 42 Cal.3d at p. 275.) In applying this standard, we are mindful of the policy favoring trial on the merits. In light of this policy, an order denying review is subject to more careful scrutiny. (*Id*. at p. 276.)

A. Estoppel

Petitioner claims that District is estopped from asserting that his petition was untimely because District strategically delayed providing notice of the claims filing requirement. Petitioner states, in a letter sent on April 4, 2003, that about a week after the accident, District's claims examiner requested information concerning petitioner's injuries but failed to make any reference to the claims filing requirement. Instead, District notified petitioner of the requirement in a letter dated June 9, 2003.

To establish estoppel against a public entity, the party must prove the following elements: the public entity was apprised of the facts; the public entity intended its conduct to be acted upon or acted in such a way as to cause the party asserting the estoppel to believe it was so intended; the party was ignorant of the true facts; and detrimental reliance. (See *Munoz, supra*, 33 Cal.App.4th at p. 1785; *DeYoung v. Del Mar Thoroughbred Club* (1984) 159 Cal.App.3d 858, 862.) Estoppel cannot be raised for the

first time on appeal. It must be pled and proved as an affirmative bar to the defense of statute of limitations. (*Munoz, supra*, at p. 1785.)

In this case, petitioner's claim fails for a few reasons. First, as a procedural matter, petitioner did not assert the claim of estoppel in his pleading below. Petitioner, therefore, has failed to preserve this issue for review.

Second, petitioner's argument lacks evidentiary support. Although petitioner refers to an April 4, 2003, letter, the record does not contain a copy of the letter. An appellate court cannot presume the existence of a letter that was never submitted to the trial court nor included in the appellate record nor offered pursuant to a request for judicial notice. (See *DeYoung, supra*, 159 Cal.App.3d at p. 863.) Apart from petitioner's bare allegation that District failed to give notice of the claims filing requirement at its earliest opportunity, nothing in the record supports the petitioner's argument that the District affirmatively acted in some way to cause delay or prejudice.

Third and finally, even if District sent the April 4, 2003, letter, petitioner cannot establish that District intended to deprive petitioner of timely notice or caused him to file a late claim. Unlike in the case cited by petitioner, there was no evidence in this case to suggest that District and petitioner were engaged in ongoing communications that would have induced a reasonable person to believe that no further action was necessary to perfect his claim. (*Bertorelli v. City of Tulare* (1986) 180 Cal.App.3d 432, 441; see also *Ocean Services Corp. v. Ventura Port Dist.* (1993) 15 Cal.App.4th 1762, 1776.) Moreover, in this case, District sent petitioner the June 9, 2003, letter, which informed him that he was required to file a claim within six months of the date of the accident. The

June 9, 2003, letter provided petitioner with notice well within the statutory period. Petitioner had over three months until the September 25, 2003, deadline. Nothing in the record suggests that three months was an inadequate amount of time. After receiving notice of the claims filing requirement, petitioner had no reason to believe that he was not required to file a claim under sections 910 and 911.2.

For these reasons, we reject petitioner's claim that District was estopped from asserting that his claim was untimely.

B. Reasonable Time

The statutory period for filing a claim expired on September 25, 2003. Petitioner filed an application for leave to file a late claim on October 30, 2003. The court found that there was no evidence that petitioner filed the application within a reasonable time. Petitioner argues that the court abused its discretion.

Decisive in this case was the absence of any evidence to support the allegations in the petition. The record on appeal, including the clerk's transcript, the reporter's transcript, and supplemental clerk's transcript, consists of 58 pages. The only evidence before the trial court was the claims examiner's declaration and the June 9, 2003, notice letter, both of which were offered by District. Nothing in the record, therefore, suggested that the claim, while only a little over one month late, was filed within a reasonable time.

The application to file a late claim must be made within a reasonable time, as stated in section 946.6, subdivision (c), and no later than one year after the accrual of the cause of action, as stated in section 911.4. The petitioner bears the burden of showing that his application was made within a reasonable time. (*Drummond v. County of Fresno*

(1987) 193 Cal.App.3d 1406, 1411.) Reasonableness is a factual determination made by the court based on the particular circumstances involved in the case. (*Ibid*.) The circumstances may reveal an explanation for the late claim or that the party was otherwise diligent in pursuing his claim. (See *Ebersol v. Cowan* (1983) 35 Cal.3d 427, 437; *Lutz v. Tri-City Hospital* (1986) 179 Cal.App.3d 807, 811.) Nothing in the statutory scheme suggests that a 30-day delay, which is relatively short, is reasonable as a matter of law. The amount of time, regardless of whether it is 30 days or six months, is reasonable when justified by the circumstances.

Here, even if we assume that petitioner was diligent in seeking legal counsel, as alleged in his petition, there is no competent evidence to explain why petitioner and his current attorney took approximately 35 days to submit an application to file a late claim. According to the factual summary in petitioner's opening brief, on September 29, 2003, his current attorney sent the claims examiner a letter of representation, which also attempted to confirm that no claim was required under section 910. On October 3, 2003, the claims examiner replied that petitioner was advised of the claims filing requirement on June 9, 2003. While these facts may help to explain why petitioner waited until late October of 2003 to file his application, there is no evidence to support these facts. As noted by the court, petitioner failed to submit any evidence to explain the filing of the late claim. Based on this record, we conclude that the trial court did not abuse its discretion in finding that petitioner failed to file his application within a reasonable time.

C. Excusable Neglect

Petitioner also claims the trial court erred in finding petitioner's neglect

inexcusable.

In addition to showing that his application was filed within a reasonable time, the petition also must show that his failure to present a timely claim was the result of mistake, inadvertence, surprise, or excusable neglect. (§ 946.6, subd. (c)(1).) Petitioner's claim focuses on the defense of excusable neglect.

Neglect is excusable when a reasonable person might have acted in the same way under similar circumstances. (*Department of Water & Power v. Superior Court* (*Dzhibinyan*) (2000) 82 Cal.App.4th 1288, 1294.) In determining whether the petitioner's neglect was excusable, the court considers the nature of the neglect and whether counsel was otherwise diligent in pursuing the claim. (*Ibid*.) The failure to conduct reasonably prudent investigation does not constitute excusable neglect. (*Ibid*.) Where petitioner has information from which a public entity's potential liability may be discovered, the failure to use that source of information is deemed inexcusable. (*Ibid*.)

In his petition, petitioner alleged that his current attorney mistakenly assumed that no claim was required because the insurer for the person allegedly responsible for the accident was named, "Self-Insured Schools of California" and because the insurer never mentioned in any prior correspondence the claims requirement. In proving this allegation, petitioner must show by a preponderance of the evidence that his current attorney acted reasonably in assuming that the person allegedly responsible for the accident was not a public entity.

As the court below, we conclude that petitioner has failed to meet his burden. In his proposed late claim, petitioner described the accident as follows: "Claimant was

operating a vehicle southbound on Collier Avenue. At or about Central Avenue, claimant was rear-ended by an operator of a Lake Elsinore Unified School District bus, Jeanne Victoria Chavez." Petitioner was involved in an accident with a school bus. While not all school buses are operated by public schools, this evidence, at minimum, suggested involvement by a public entity and its potential liability.

Moreover, the SISC sent petitioner a letter identifying the school district and informing him of the claims filing requirement. Both in the caption and the body of the letter, the insurer identified the public entity as the Lake Elsinore Unified School District. The insurer wrote: "Please be advised that if you intend to pursue a bodily injury claim against Lake Elsinore Unified School District, you must do so within six (6) months from the date of the occurrence in accordance with the provisions of Government Code 910, et[.] seq. I am enclosing a claim form for your use in presenting a claim if you so desire." From this letter, petitioner should have known that the vehicle was a school district bus and that a government claim was required. (See *Spencer v. Merced County Office of Education* (1997) 59 Cal.App.4th 1429, 1438-1439.) Therefore, unlike in the cases cited by petitioner, in this case, the attorney's failure to investigate whether the school bus was owned or operated by the school district constituted inexcusable neglect. (Compare *Shank v. County of Los Angeles* (1983) 139 Cal.App.3d 152, 157 with *Bettencourt v. Los Rios Community College Dist., supra,* 42 Cal.3d 270.)

Petitioner nevertheless argues that the letter provided inadequate notice because it was sent directly to him, rather than his attorney. Nothing in the record, however, suggests that petitioner provided notice of representation to District or its insurer before

the June 9, 2003, letter. Furthermore, nothing in the record provides an adequate explanation for why petitioner failed to forward the letter or the information in the letter to his attorney. Petitioner must bear the consequences of his own negligence. (See *Aldrich v. San Fernando Valley Lumber Co*. (1985) 170 Cal.App.3d 725, 739.)

Petitioner also argues that his current attorney acted reasonably in mistakenly assuming that no claim was required because the petitioner's former attorney had not filed a claim. Petitioner stated that, when he retained his current attorney, his case file did not reflect "whether or not the claim was ever filed" with District. Because petitioner's case file was unclear as to whether a claim was required, a reasonable attorney should have investigated the matter to preserve petitioner's claim. (*Spencer, supra*, 59 Cal.App.4th at p. 1438.) "Once the potential plaintiff has retained counsel, it is the responsibility of counsel to diligently investigate the facts, identify possible defendants, and timely file the tort claim. [Citation.] Section 946.6 expressly requires a showing of *excusable* neglect for relief from the failure to file a tort claim. Mistake of counsel is not a basis for granting relief from the claim filing requirements." (*Dzhibinyan, supra,* 82 Cal.App.4th at p. 1294, fn.3.)

Again, the record is devoid of any reasonable explanation for counsel's failure to investigate the matter within the statutory period. While petitioner's attorney states that she was confused by the insurer's name, the only piece of evidence in the record with the insurer's name is the June 9, 2003, letter. It is unclear, therefore, whether petitioner's current attorney was apprised of the June 9, 2003, letter. If so, as mentioned above, she should have known that the accident involved a public entity. If petitioner's current

attorney's references are to other correspondences, there is nothing in the record to support her statement that these other letters existed and that they identified the insurer in a way that suggested that it did not represent a public school district. In any event, there was no evidence that petitioner's attorney acted diligently in investigating the matter and identifying the potential defendants. There is no indication in the record that petitioner's attorney took any active steps to preserve petitioner's claim.

The trial court did not abuse its discretion in finding that petitioner failed to meet his burden of establishing excusable neglect. We conclude the court properly denied the petition to file a late claim under section 946.6.

4. Disposition

We affirm the trial court's order. District shall recover its costs on appeal.

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s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/Hollenhorst
J.